

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Hon. Hugh B. Scott

v.

08CR296S

MICHAEL J. MORIN,

**Report
&
Recommendation**

Defendant.

By Order of Judge William M. Skretny dated September 24, 2008, the above case was referred to the undersigned, with the consent of the defendant, to take the defendant's plea of guilty and to conduct an allocation pursuant to Rule 11 of the Federal Rules of Criminal Procedure for a Report and Recommendation. On October 10, 2008, defendant entered a plea of guilty in a plea allocution before the undersigned and a Report and Recommendation was rendered on October 10, 2008 (Docket No. 7); that first Report and Recommendation (and the transcript of the October 10, 2008, allocution) is incorporated by reference in this second written Report and Recommendation. This case was referred back for further Rule 11 allocation regarding the waiver of rights to appeal or to collaterally attack the sentence (Docket No. 10). The following is my second Report and Recommendation as to the defendant's plea of guilty, in particular regarding defendant's waivers.

On December 29, 2008, the further allocution was held and defendant reaffirmed his plea of guilty in this case, as set forth in the transcript of the plea proceeding, which is incorporated by reference in this written Report and Recommendation. During this allocution, defendant expressly waived his rights to appeal and to collaterally attack his sentence and that waiver is found to be knowing, intelligent and voluntary. In accordance with my findings at the close of the plea proceeding, it is my Report and Recommendation that the defendant's plea of guilty (entered on October 10, 2008) and his subsequent waiver of his appeal and right to attack his sentence collaterally (entered on December 29, 2008) accords with the requirements of Rule 11 of the Federal Rules of Criminal Procedure.

It is recommended that your Honor adjudge the defendant guilty of the offense(s) to which the guilty plea was offered. The time from December 29, 2008, until Judge Skretny rules on this Report and Recommendation is excluded from the Speedy Trial Act calendar pursuant to 18 U.S.C. §§ 3161(h)(1) and 3161(h)(1)(J).

Pursuant to 28 U.S.C. § 636(b)(1), it is hereby ordered that this Report & Recommendation be filed with the Clerk of the Court and that the Clerk shall send a copy of the Report & Recommendation to all parties.

ANY OBJECTIONS to this Report & Recommendation must be filed with the Clerk of this Court within ten (10) days after receipt of a copy of this Report & Recommendation in accordance with 28 U.S.C. § 636(b)(1), Fed. R. Cr. P. 59(b)(2) and W.D.N.Y. Local Criminal Rule 58.2(a)(3).

**FAILURE TO FILE OBJECTIONS TO THIS REPORT & RECOMMENDATION
WITHIN THE SPECIFIED TIME OR TO REQUEST AN EXTENSION OF SUCH TIME
WAIVES THE RIGHT TO APPEAL ANY SUBSEQUENT DISTRICT COURT'S
ORDER ADOPTING THE RECOMMENDATIONS CONTAINED HEREIN.** Thomas v.
Arn, 474 U.S. 140 (1985); F.D.I.C. v. Hillcrest Associates, 66 F.3d 566 (2d Cir. 1995); Wesolak
v. Canadair Ltd., 838 F.2d 55 (2d Cir. 1988).

The District Court on de novo review will ordinarily refuse to consider arguments, case law and/or evidentiary material which could have been, but was not, presented to the Magistrate Judge in the first instance. See Patterson-Leitch Co. Inc. v. Massachusetts Municipal Wholesale Electric Co., 840 F.2d 985 (1st Cir. 1988).

Finally, the parties are reminded that, pursuant to W.D.N.Y. Local Criminal Rule 58.2(a)(3), "written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority." **Failure to comply with the provisions of Rule 58.2(a)(3) may result in the District Court's refusal to consider the objection.**

SO ORDERED.

/s/ Hugh B. Scott
Hon. Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York
December 30, 2008